

An Analysis of the H-2 Program: The Admission of Temporary Foreign Agricultural Workers into the United States

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To the uninitiated, the so-called H-2 or temporary worker provisions of the Immigration and Nationality Act give the appearance of a complex regulatory maze. The intricate nature of this scheme has proven not only to be confounding at times, but has also posed serious obstacles to the expeditious determination of whether temporary foreign workers should be allowed to work within our borders.

There is little quarrel with the premise that the immigration laws should not foster a dependency on foreign labor. That, however, is not the issue before us. Rather, our concern is with the role to be played by the H-2 program in assimilating temporary foreign workers when the supply of domestic labor is found to be inadequate. The efficacy of such a system depends upon its ability to employ these workers in a fair, efficient, and orderly manner. Otherwise, as history indicates, the disequilibrium between the supply and demand of available workers will result in the creation of a class of undocumented persons who are beyond the protection of our laws. In this regard, former Immigration and Naturalization Service Commissioner Leonel Castillo, eloquently characterized the situation in stating that the "U.S. is experiencing the world's largest temporary worker program, larger than the guest worker programs of France, Holland and Germany. Only ours is unregulated . . . resulting in the Immigration Service having to arrest over a million persons annually . . . whose crime is that they want to work in this country."¹ This uncontrolled situation has in turn threatened domestic workers with displacement.

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1. JOHNSON FOUNDATION, MEXICO-UNITED STATES RELATIONS: REPORT OF A WING-SPREAD SYMPOSIUM 10 (D. Meissner ed. 1979).

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It is the intent of this Commentary to examine the effectiveness of the current H-2 framework in accomodating actual labor market needs. Although the H-2 provisions apply to occupations as diverse as baseball players, musicians, lumbermen, and farmworkers, the focus of our remarks will address primarily the agricultural situation. This particular concern has been the topic of much discussion in recent months, as Congress has continued its deliberation over proposals contained within a comprehensive immigration reform package known as the Simpson-Mazzoli bill.² The long ensuing debate over the use of foreign workers in the United States has been one of the more controversial features in the consideration of this omnibus legislation.

I

The so-called H-2 provisions of the Immigration and Nationality Act³ have given rise to a system that is primarily regulatory rather than statutory in nature. This system is essentially the product of regulations promulgated by both the Immigration and Naturalization Service and the Department of Labor. Under current law, the Attorney General is vested with the ultimate authority over the admission of non-immigrant foreign workers. However, for practical purposes the Department of Labor has been the agency primarily responsible for making the determination regarding the nonavailability of American workers and whether the employment of aliens would "adversely affect" domestic wages and working conditions.

In order to make this determination, the United States Employment Service (a division of the Department of Labor) establishes "adverse effect wage rates" and working conditions. These stipulated wages and working conditions include housing, the provision of tools (without cost to the worker), transportation, fixed price meals, minimum guarantees concerning the duration of employment, and eligibility for workers compensation insurance.

If an employer anticipates a shortage of domestic workers, he must file an application for temporary labor certification with the state Employment Service at least eighty days prior to the date of need. The application must include a job offer for U.S. workers at the same level of wages and working conditions offered to foreign workers. The temporary labor certification is granted or denied by the Department of Labor at the later of either a sixty day recruitment period or twenty days from the

2. H.R. 1510, S. 529, 98th Cong., 1st Sess. (1983); H.R. 6514, S. 2222, 97th Cong., 2d Sess. (1982).

3. 8 U.S.C. § 1101(a)(15)(H)(ii) (1982).

estimated time of need. A temporary labor certification is not to exceed eleven months.

II

Any serious discussion of the H-2 program cannot be divorced from its practical context. The conditions faced by apple growers and sugarcane harvesters on the East Coast have proven to be fairly amenable to the bureaucratic delays and inefficiencies of the current regulatory regime. However, the program has proven to be of no real utility to the western United States. For instance, in California and Arizona, where

State	Number of H-2 workers by year and industry			Industry
	1979	1980	1981	
Connecticut	135	131	129	Apples
Florida	8,530	8,852	8,801	Sugarcane
Maryland	384	181	366	Apples
	177	185	234	Peaches/Apples
	—	60	0	Tree pruners
Massachusetts	447	459	441	Apples
Maine	432	447	434	Apples
	797	699	529	Woods
New Hampshire	349	335	307	Apples
	138	82	85	Woods
New York	2,571	2,308	1,914	Apples
Virginia	1,141	1,103	1,125	Apples
	668	1,066	1,271	Tobacco
	—	42	52	Cabbage
West Virginia	744	772	701	Apples
Arizona	385	236	184	Citrus
	66	49	58	Sheep raising
California	287	293	290	Sheep raising
Colorado	134	0	0	Apples
	26	0	0	Peaches/Pears
	0	0	176	Vegetables
	60	91	76	Sheep raising
Idaho	237	273	255	Sheep raising
Montana	0	5	3	Sheep raising
Nevada	22	37	30	Sheep raising
Oregon	50	41	46	Sheep raising
Texas	4	0	0	Sheep raising
Utah	36	40	38	Sheep raising
Washington	6	6	7	Sheep raising
Wyoming	88	136	112	Sheep raising

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up to 300,000 workers harvest crops, and at least one half are foreign citizens, virtually no H-2 workers have been used. The accompanying chart illustrates the startling contrast between the number of H-2 workers employed in the eastern and western states.

Western agriculture has traditionally required large numbers of workers for relatively short periods of time. Unfortunately, the short harvest season for many labor intensive, highly perishable crops in the West leaves most of its agriculture with a smaller margin of error than exists with East Coast crops.

Also, western agricultural labor must have the freedom to move from employer to employer and from crop to crop. Under the current program, however, H-2 workers must contract with one employer (or association) and transfers among employers is a cumbersome process. Ironically, it was this same lack of mobility among workers that was responsible for many of the abuses under the old bracero program. (Under that program farmworkers were imported from Mexico for seasonal agricultural work under a bilateral agreement during 1942-64.)

It is for these reasons, against a backdrop of a 100 year old tradition of Mexican worker migration, that western growers have developed a reliance on undocumented aliens to harvest their crops. Although it is difficult to measure the size of the illegal workforce in western agriculture, testimony before the Subcommittee of the House Judiciary Committee on Immigration, Refugees, and International Law indicates that it is in excess of fifty percent of the industry's workforce.⁴ This has resulted in the creation of a fearful subclass of people within our society that are often reluctant to seek medical assistance or report crimes. The *sub rosa* nature of their existence puts them at the mercy of unscrupulous employers and beyond the protection of our labor laws. Without a doubt their vulnerability can be attributed largely to their illegal status. Ironically, some agricultural employers have resorted to ingenious schemes to neutralize the fear of detection among workers. Premiums analogous to "combat pay" are often made to undocumented workers based on their proximity to highways or other high risk locations which might pose a greater threat of discovery by immigration officials.⁵

The failure of our immigration laws to address a massive flow of migratory workers back and forth across our southwest border is a vivid

4. *Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 110 (1981).

5. Maxwell, *Refugio and Juan—Pawns in the Immigration Debate*, Los Angeles Times, Sept. 29, 1982, § II, at 7, col. 1.

manifestation of the fact that the major focus of United States immigration policy has continued to be on permanent legal immigration, principally from Europe. Our laws are still steeped in the turn-of-the-century milieu when legal immigration to the East Coast of the United States was the central issue facing policymakers. Unfortunately, the absence of reform measures designed to accomodate the need for short term non-immigrant workers in the West has merely diverted the flow of labor underground beyond the reach of any regulation.

III

Today the question must be addressed as to whether the current H-2 provisions can play a role in reducing the pressures affecting illegal immigration. Serious review of this matter can no longer be avoided. Recognizing this, President Carter requested a review of the H-2 program in conjunction with his own proposals to control the entry of undocumented aliens.

It should be noted that when consideration was being given to plans which ultimately led to the termination of the infamous bracero program, there was some feeling that a rewriting of the H-2 provisions might accomodate the continued importation of Mexican labor. However, then Labor Secretary Willard Wirtz had a far different idea in mind. In a statement accompanying proposed H-2 regulations in December of 1964 he wrote:

The issuance of the new regulations is essential to the orderly administration of Public Law 414 [the H-2 program], but it does not imply that there will be any large scale use of foreign workers in the future. To the contrary, it is expected that such use will be very reduced and hopefully eliminated.⁶

This pronouncement is of particular importance in that it indelibly marked the philosophy and conduct of the H-2 program since that time. With some justification, the Secretary envisaged the *raison d'être* of the Department to be the promotion of domestic employment. Since then, an institutional bias has evolved that is consonant with that objective.

However, the most laudable objectives do not always ensure the desired results. There is little disagreement (except possibly by those with a vested interest in perpetuating the unregulated status quo) that temporary foreign labor should be a measure of last resort to be utilized only if domestic workers are unavailable. However, experience would

6. CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 96TH CONG., 2D SESS., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES 65 (prepared at request of Senate Judiciary Comm. for use of the Select Comm'n on Immigration and Refugee Policy) (Comm. Print 1980).

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seem to indicate that there are some tasks that, for a variety of reasons (such as the arduous nature of the work, absence of opportunities for mobility, low to moderate pay *vis-a-vis* unemployment insurance payments and public assistance, and the low level of job esteem) would go undone in the absence of some provision for temporary foreign workers.⁷

As mentioned previously, this domestic labor gap has largely been filled by undocumented aliens. Even though a *de jure* termination of the bracero program took place in 1964, a *de facto* "foreign worker" program has continued in an unsanctioned fashion. During the peak years of the bracero program in 1957-59, more than 400,000 temporary workers were admitted annually. During that same time period, authorities apprehended an average of 37,000 undocumented aliens annually. After the demise of the program, however, apprehensions of undocumented workers soared to 400,000 in 1972 and to nearly one million in 1977.⁸ These figures offer little solace to those who had hoped that the flow of foreign workers into the United States could be cut off by mere fiat. Quite to the contrary, migration has merely gone underground beyond the influence of those who, with the best of motives, sought to end the program.

This brings us back to our earlier question concerning the feasibility of using the current H-2 program as a means of supplanting the heavy reliance of western agriculture on undocumented aliens. Since the program currently involves about 18,000 agricultural workers each year⁹ it pales before the likely demand for foreign workers in the western United States. If we were able to totally seal off our southern border we could be faced with the prospect of a domestic labor gap of as many as 200,000 to 300,000 agricultural workers. For the H-2 program to be able to accommodate such demand it would have to be significantly altered.

In addition, it is highly unlikely that the Department of Labor could administer a program of this magnitude without an increase of personnel. Finally, the underlying philosophy that has characterized the H-2 provisions since the mid-1960's would have to undergo serious reconsideration. Any serious intent to utilize this program would involve a number of changes in the current regulatory scheme (as discussed below) designed to expedite its administration. In short, it is inconceivable to imagine any circumstances under which the present H-2 provisions

7. NATIONAL COMMISSION FOR MANPOWER POLICY, TEMPORARY ADMISSION OF FOREIGN WORKERS: DIMENSIONS AND POLICIES, SPECIAL REPORT NO. 34, 31-2 (1979).

8. *Id.* at 14.

9. CERTIFICATIONS, U.S. EMPLOYMENT SERVICE, U.S. DEP'T OF LABOR, LABOR CERTIFICATIONS GRANTED FOR TEMPORARY FOREIGN WORKERS (H-2's) IN AGRICULTURE AND LOGGING OCCUPATIONS (Jan. 29, 1982).

could in themselves play a major role in reducing the flow of undocumented labor into the United States.

IV

The reality of a migratory flow of labor from Mexico is not going to disappear. In the western United States, this pattern has deep historical roots that date back into the early 1880's. In fact, our laws have periodically reflected a cognizance of this longstanding phenomenon. Specifically, Mexicans were exempt from the four dollar head tax imposed on each immigrant by the Immigration Act of 1907. Mexican agricultural workers were exempt from all restrictions imposed by the 1917 Act (such as the literacy test, eight dollar head tax, and prohibition against entry by contract labor). The provisions of the 1924 Act requiring all entrants to obtain visas and the prohibitions against entry by anyone having more than fifty percent Indian blood were not enforced against persons from Mexico.¹⁰ Between 1942 and 1964, in excess of four million Mexican workers made the journey to the United States for temporary work under the much maligned bracero program. As mentioned previously, the flow of undocumented workers continues today on a *sub rosa* basis.

In 1979 one of the authors toured our southwest border from Texas to California. Conversations at that time with those who were illegally attempting to enter the United States underscored the fact that their major aspiration is to find work north of the border. Many planned to return to their homes in Mexico after accumulating a predetermined level of earnings, or following the completion of tasks of a fixed duration. Although every effort should be made to enhance the enforcement of our immigration laws (to be discussed below) there are both "push factors" in the sending countries, and "pull factors" here in the United States that are likely to continue to influence migration in the foreseeable future.

The current H-2 program is unlikely to meet this challenge in the absence of significant changes. Therefore, Congressman Lungren believes that an alternative approach should be implemented, so he introduced the United States-Mexico Good Neighbor Act in the 96th Congress. This legislation would have provided that the Attorney General establish a program for the admission, as non-immigrants, of a predetermined number of Mexican nationals who desire to perform temporary services or labor in the United States. Their resulting temporary worker visas would have been valid for eleven months.

10. W. CORNELIUS, *Mexican Immigration: Causes and Consequences for Mexico*, in SOURCEBOOK ON THE NEW IMMIGRATION 70-71 (R.S. Bryce-Laporte ed. 1980).

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Workers would not be restricted as to type of employment or employer under this proposal. By contrast, it should be noted that the "indentured servant" relationship, which was responsible for many of the abuses of the bracero era, also characterizes the current H-2 program. In the case of the latter, workers are petitioned for by specific employers. A petition is automatically withdrawn if the prospective employer dies, goes out of business, or withdraws the petition prior to the arrival of workers in the United States. If an alien desires to change employers, the cumbersome process of resubmitting another petition must be initiated by the new employer.¹¹

The major qualification under the U.S.-Mexico Good Neighbor Act would be that the Secretary of Labor, in consultation with the Attorney General, would prohibit employment in those situations where an adequate work force already exists. In addition to penalties that would be imposed on those who failed to return to Mexico at the end of their employment period (the individual would be ineligible to participate in the program for five years), there would also be incentives to encourage return. Specifically, the bill proposed to make the Social Security contributions of the employee and employer personally redeemable by the temporary worker upon returning to Mexico at any one of nine U.S. consular offices.

Finally, this proposal would enable the President to negotiate with representatives of the government of Mexico concerning the establishment of an advisory commission to consult with the Attorney General regarding the operation of the temporary worker program. It would be short-sighted for us to consider a change in our laws without taking into account its potential impact on Mexico. With the recent unfolding of calamitous events facing our southern neighbor, such precipitous action would be ill-advised. Unemployment and underemployment currently total almost forty-five percent of its labor force. Mexico would need 850,000 new jobs every year just to keep up with population growth. In the midst of a liquidity crisis, an \$80 billion foreign debt and ninety-five percent inflation, the country faces perhaps the most severe strain on its economic, political, and social fabric since the Revolution of 1910.

The basic thrust of this proposal is not to supplant the current H-2 program. Rather, it is a response to the fact that the H-2 provisions, as currently structured, fail to accommodate the diversity of national labor market conditions. A guestworker program jointly developed with Mexico provides our best hope for protecting the integrity of our border, while simultaneously bettering our relations with our neighbor to the

11. TEMPORARY WORKER PROGRAMS, *supra* note 3, at 76.

south. Similarly, the contemplated status change from "illegal alien" to "legal worker" who can insist on adequate wages and working conditions, will eliminate much of the unconscious exploitation of such workers and remove a blot from our national conscience.

V

The issue of temporary foreign workers arose during the last Congress' consideration of omnibus immigration reform legislation, the Simpson-Mazzoli bill. Along with employer sanctions, adjudicatory revisions, and a provision for the legalization of specified undocumented aliens, the bill contained a codification of several changes in the current H-2 regulations.

We believe the questions of the shape and dimensions of a temporary worker program are integral aspects of comprehensive immigration reform. If the Congress is to adopt sanctions against those employers who knowingly hire undocumented aliens there must be an assurance that temporary foreign workers will be available if domestic labor is not. Otherwise, employers will be faced with the untenable position of either violating the law or going out of business. Also, in tandem with the sanctions and legalization provisions of the bill, a temporary worker program would reduce the scope of responsibility facing the Immigration and Naturalization Service, and thereby enhance the enforcement capability of the Border Patrol.

As originally drafted in the 97th Congress, the Simpson-Mazzoli bill sought to utilize the existing H-2 structure as the means of accomplishing these objectives. Yet, it was soon realized that the feasibility of doing so is questionable at best. If the program is to provide the means necessary to assimilate large numbers of those individuals currently entering the United States illegally, a more flexible, timely, and responsive mechanism is required.

Although it is our feeling that a guestworker concept (as outlined above) is the optimal approach to the problem, a majority on the Subcommittee on Immigration, Refugees, and International Law did not agree. (An amendment proposing such a program failed by a vote of 4 to 3.) We were thus left with the H-2 framework as the only available vehicle for change in the bill. Accordingly, a series of amendments designed to streamline the current regulations was adopted on the Subcommittee level.

One thing should be made clear from the outset. The revisions made to the H-2 program in the Simpson-Mazzoli bill in the 97th Congress can in no way be construed as tantamount to the adoption of a bracero

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program. Assertions to the contrary made by the bill's opponents are patently inaccurate. The basic role played by the Department of Labor in protecting the wages and working conditions of workers would have remained unchanged by our amendments. Our primary focus was to ensure that petitions would be handled in a balanced and expeditious manner.

The Subcommittee amendments did not in any way detract from the applicability of the H-2 process to east coast crops. Rather, they were merely intended to make the program workable in those areas of the country where it has heretofore been largely irrelevant. For example, the ability to foresee when crops will be ready to harvest involves the potential for an unlimited number of surprises by "Mother Nature." The further ahead one attempts to predict the harvest date, the more numerous the potential intervening variables are likely to be. The difficulties are compounded with regard to many of the assiduous specialty crops grown in the western United States. Therefore, an amendment was introduced to reduce the risks inherent in this process by guaranteeing that the employer will not have to file a petition for temporary foreign workers any more than fifty days from the time of need. Under existing regulations the petition must be filed a "minimum" of eighty days prior to the estimated harvest date. The language in the Senate bill (reference to the Senate bill shall hereinafter relate to S. 2222, as passed by the full Senate) set a "maximum" of eighty days prior to the required date. Needless to say, the onus of the risk still lies with the grower at fifty days. However, our approach in the Subcommittee at least made an attempt to reduce the level of uncertainty. Since predictive error can result in the loss of an entire crop this seemed to be a reasonable provision.

An additional procedural reform adopted by the Subcommittee involved a requirement that the employer be notified within seven days of the date of filing about whether the application is acceptable as to form and content. This was intended to address the problem of receiving a petition rejection for failure to "dot an 'i' or cross a 't' " without time to resubmit a corrected petition. The amendment would have codified a requirement that is currently contained in the Department of Labor's General Administrative Letter. The Senate bill contained no comparable provision.

Another Subcommittee amendment would have mandated that the Secretary of Labor reconsider within seventy-two hours the denial of a petition for temporary foreign workers if "able, willing, and qualified" domestic workers fail to materialize on the date of need. Our Subcom-

mittee felt that, in view of the crop damage that could result from a delay in redetermining the merits of a petition, expeditious reconsideration should be required. This revision was not included in the Senate version of the bill.

Section 214(c) of the Immigration and Nationality Act currently provides that the Attorney General shall have the ultimate authority regarding the importation of foreign workers after consultation with "the appropriate agencies of the government." In actual practice this consultation has become limited to the Department of Labor exclusively. Another amendment to the Subcommittee bill simply provided that the Department of Agriculture should also be deemed to be an appropriate agency for consultation purposes. Since over one-third of all current H-2 workers are involved with agricultural labor, and our bill presumably included a good faith effort to cover the western states' agricultural experience, there is no reason why the Department of Agriculture should not have some input into the process. This will be especially important if the agricultural component of the H-2 program increases, as is likely if employer sanctions are adopted. The Senate bill had no comparable provision.

The availability of domestic workers is of little consequence unless they are also able and willing to work. The Subcommittee accepted an amendment providing that domestic labor be "able and willing" to work in addition to being merely available. The amendment also stipulated that such workers should be available at the time and place they are needed to perform the labor or services involved in the petition. The Senate version of the bill contained similar provisions. The Subcommittee amendments preserved the "adverse effect" test (see page 241) on wages and working conditions and clarified the focus of the Secretary of Labor's determination by restricting it to the area of intended employment.

It was also our feeling that the eleven month period during which an H-2 worker can remain in the United States should not have been reduced to eight months as it was in the original version of the Simpson-Mazzoli bill. The eleven month limitation was restored in order to allow the needed flexibility to accommodate traditional work patterns between different work sites of the same employer or association of employers. This change was never made in the Senate bill.

Finally, our Subcommittee adopted an amendment (as did the Senate) which provided that the Attorney General, in consultation with the Secretary of Labor and the Secretary of Agriculture (in connection with agricultural labor or services) must approve the regulations implement-

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ing the H-2 section of the bill. As mentioned previously, the Department of Labor has had a virtual monopoly with regard to issuing regulations concerning the H-2 program. In light of the fact that the immigration bill would directly affect the agricultural sector of our economy through the adoption of employer sanctions and the revised H-2 process, it seemed only appropriate that the Department of Agriculture should play a role in the implementation of the temporary worker program.

In the aggregate, the changes adopted by the Subcommittee constituted a major step towards achieving a workable H-2 program. They streamlined numerous procedural obstacles that have previously encumbered use of the program in the western United States and opened up the process to include the additional perspective of the Department of Agriculture. Yet at the same time the amendments did not compromise the integrity of the present certification process, which protects the wages and working conditions of American labor.

However, when the amended Subcommittee bill came before the full Judiciary Committee for consideration, it soon became apparent that the H-2 revisions would be at the center of controversy. Elements of organized labor threatened to withdraw their support from the entire bill if dramatic changes were not made in the temporary worker provisions. By contrast, western agricultural producers (who were anxious about the H-2 provisions anyway) considered the Subcommittee bill to be the absolute minimum that they could live with.

To avert a clash that might ultimately have jeopardized the consensus in support of comprehensive immigration reform, the bill's sponsors sought to bring the contending parties together in an attempt to find some basis for accommodation. The result was—in the truest sense of the word—a compromise. The specific reference in the Subcommittee bill to the eleven-month certification limit was dropped in the compromise version. Instead, the current regulations were incorporated by reference. The provision concerning the formulation of regulations relating to the implementation of the H-2 section of the bill were omitted. Finally, the “adverse effect” wage test was applied on a national basis rather than limited to the area of intended employment.

These alterations to the bill sufficed to allay the concerns of some liberals on the Committee while maintaining the support of those who felt that the current H-2 regulations should be made more flexible. The bipartisan nature of the compromise was such that the H-2 issue ceased to be a point of contention in the full Committee mark-up of the bill. In addition, an amendment was adopted expressing the sense of Congress

that the President should establish an advisory commission with Mexico to advise the Attorney General on the operation of the H-2 program.

However, subsequent to these deliberations, and without the benefit of any hearings on the bill, the Education and Labor Committee drafted a set of amendments that would have completely hamstrung the H-2 process. Most importantly, they would have significantly limited the traditional role of the Attorney General in the H-2 process. While in practice almost total deference has been given to the Department of Labor regarding the issue of certification, it would be a serious mistake, as well as a dramatic departure from precedent, to strip the Department of Justice (through the Immigration and Naturalization Service) of its final authority over the admission of foreign workers. There are occasions when the additional perspective of the Justice Department may be significant. For example, the decision to admit onion pickers into Presidio, Texas in June of 1977 (which reportedly had the support of President Carter) was made in spite of the refusal of the Department of Labor to grant the certification of H-2 workers. There is little reason to believe that any department or agency of government has a monopoly on wisdom.

Moreover, the Education and Labor Committee amendments would have denied the Department of Agriculture even an advisory role with regard to the conduct of the H-2 program. So determined was the Committee to ensure the domination of the Department of Labor (DOL), that the Attorney General would have been prohibited from approving more H-2 petitions than were granted in 1982 unless DOL certified that it had adequate funds and personnel to enforce the H-2 provisions. Although we have mentioned previously that an expansion of the program will necessarily entail additional resources, giving the Department *carte blanche* to determine the level of adequacy is tantamount to an absolute veto over the program. It might be queried whether there is any federal agency that considers its funding to be adequate. Finally, the fact that only 17,953 petitions were approved in 1981 indicates that the Education and Labor Committee proposal would preclude the H-2 program from playing any role in controlling the flow of illegal immigration. As mentioned previously, the domestic labor gap might be as high as 200,000 to 300,000 workers in the agricultural sector.

To add insult to injury, the Education and Labor Committee amendments prohibited the use of a domestic worker's initial level of proficiency or productivity as a basis for determining whether the individual is qualified for the work at hand. This is, to say the least, an interesting commentary on the Committee's opinion of American labor. However,

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a grower with a ripe crop of strawberries or other perishable fruit might fail to appreciate its comic value.

VI

Although the deliberations over the immigration bill proved to be for naught in the 97th Congress, as the clock ran out in the lameduck session, the exercise was nevertheless of immense value. For one thing, the House and Senate in the new 98th Congress both began where they left off rather than starting out *tabula rasa*. The experience on the H-2 question in particular should prove to be salutary.

However, the major question yet to be answered is whether those with a stake in achieving a symbolic victory over any expansion of the H-2 program will be successful in side-tracking the bipartisan compromise reached by the Judiciary Committee. If so, it will prove to be a short lived victory.

The Congress has before it the best chance in over thirty years to enact comprehensive immigration legislation. The focus of the Simpson-Mazzoli bill is (to quote the Select Commission on Immigration) "to close the back door on illegal immigration so that the front door on legal immigration may remain open." An integral aspect of this objective is to curtail the dependency on undocumented labor that exists in some sectors of our economy. A revised H-2 program is totally consistent with that objective.

It is the illegal status of undocumented labor that displaces American workers, depresses domestic wage rates, and leads to the unconscionable exploitation of foreign workers. The historical flow of temporary foreign workers across our borders cannot be ignored. If there is not in fact a need for foreign labor then so be it. The availability of a workable system will be of little consequence in that case. However, if experience is any guide to the future, employers must not be given the incentive to rely on undocumented labor.

No one can predict with certainty what the years ahead hold in store for us. Many analysts speculate that the need for some foreign labor will continue in the foreseeable future.¹² As we stand at the precipice of a post-industrial economy, the opportunity costs of some types of labor may be perceived to be too high to perform ourselves. If this is in fact the case, the economic well-being of society will be enhanced by a program to admit temporary foreign workers.

One thing is certain however, absent patrol guards standing shoulder

12. P.F. DRUCKER, *MANAGING IN TURBULENT TIMES* 92-3 (1980).

to shoulder across 5000 miles of border, we are not likely to be able to completely cut off illegal immigration. We are thus confronted with the choice of either controlling and regulating that part of the flow not deterred by employer sanctions and other means of enforcement, or burying our heads in the sand while pretending that the challenge before us does not exist.